

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
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 **SIRATHORN BALAKULA** : DETERMINATION  
 : DTA NOS. 830793and  
 : 830794  
 for Revision of a Determination or for Refund of Sales :  
 and Use Taxes under Articles 28 and 29 of the Tax :  
 Law for the Period December 1, 2009 through :  
 November 30, 2015. :

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In the Matter of the Petition :  
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 of :  
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 **AHKIN PANCHAROEN** :  
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 for Revision of a Determination or for Refund of Sales :  
 and Use Taxes under Articles 28 and 29 of the Tax :  
 Law for the Period December 1, 2009 through :  
 November 30, 2015. :

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Petitioners, Sirathorn Balakula and Ahkin Pancharoen, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2009 through November 30, 2015.

On September 12 and 15, 2022, respectively, petitioners, appearing by Becker LLC (Kent L. Schwarz, Esq. and Barry Scott Crane, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michael Hall), waived a hearing and submitted these consolidated matters for determination based on documents and briefs to be submitted by February 13, 2023, which date commenced the period for the issuance of this determination.

After due consideration of the documents and arguments submitted, Jessica DiFiore, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether the Division of Taxation properly imposed fraud penalties and interest on petitioners pursuant to Tax Law § 1145 (a) (2).

II. Whether the Division can impose interest and penalties pursuant to Tax Law § 1145 (a) (1), in the alternative, if fraud penalties are not sustained.

III. Whether the Division of Taxation properly imposed penalties pursuant to Tax Law § 1145 (a) (1) (vi) based on petitioners' underreporting in excess of 25 percent of the amount of sales tax required to be shown on the relevant sales tax returns.

***FINDINGS OF FACT***

1. Taste of Thai Express, Inc. (Taste of Thai) is a restaurant offering authentic Thai food. Petitioners, Sirathorn Balakula and Akhin Pancharoen, are the owners and responsible persons for Taste of Thai. It is open for lunch, dinner, and late-night dining seven days a week. It offers dine-in, take-out, online ordering, and delivery services.

2. Petitioners filed a form DTF-17-R, Application to Renew Sales Tax Certificate of Authority, on June 22, 2009 for Taste of Thai, with the Division of Taxation (Division). On the application, petitioners were the only people listed as responsible persons for the business. Mr. Pancharoen was listed as its president.

3. The Division commenced the relevant sales tax audit on November 12, 2013. Taste of Thai was part of a routine review of restaurants in Ithaca, New York. Taste of Thai was selected for audit because the reported sales tax due on its New York State sales tax returns, form ST-100 (ST-100), was significantly less than the reported gross payments on the merchant card data for

tax years 2011 and 2012. The gross sales reported on the ST-100s were also significantly less than the gross receipts reported on the New York State S corporation franchise tax returns, form C-3S, for tax years 2011 and 2012. Reported wages for employees were also greater than reported sales on the ST-100s.

4. The audit period in the current case was from December 1, 2009 through November 30, 2015 (audit period). Taste of Thai failed to remit most of the sales tax due during the audit period. After the audit, using petitioners' records, the Division determined petitioners failed to report \$8,310,583.71 in taxable sales and \$597,406.94 in sales tax collected but not remitted. Petitioners do not dispute that they are each a "person required to collect tax" within the meaning of Tax Law § 1131, nor that they are each responsible to pay all sales and use taxes due that Taste of Thai collected but did not remit.

5. Only three returns were timely filed during the audit period. Of the three returns, only one was submitted with payment in full for the sales tax reported to be due. The other two were filed with partial payments.

6. A search pursuant to an executed search warrant was conducted of Taste of Thai's business on January 28, 2016. At that time, several returns were not filed. On February 25, 2016, after the search was conducted, Ms. Balakula electronically filed eight sales tax returns, reporting a total sales tax due of \$314,829.00. Most of the corresponding sales tax reported on these returns was not submitted when the returns were filed.

7. Taste of Thai was subject to a prior audit for the period September 1, 2004 through August 31, 2007. For that audit period, sales records were repeatedly requested and, when received, were incomplete. General ledger detail, guest checks, and cash register tapes were not provided for the entire audit period. Guest checks that were provided did not include cash sales.

Additionally, bank deposits were greater than reported sales. The sales tax due for that period was determined using a combination of bank deposits and an observation test. The Division determined there was an additional tax due of \$31,168.36, plus interest and penalty. Taste of Thai agreed to the audit findings and set up a payment plan.

8. On May 23, 2017, Ms. Balakula and Mr. Pancharoen were arraigned in Supreme Court, Albany County, for their failure to pay sales tax due. Both were charged with one count of Grand Larceny in the second degree, four counts of Criminal Tax Fraud in the second degree, and four counts of offering a false instrument in the first degree. Ultimately, Mr. Pancharoen pled guilty to one count of Grand Larceny in the third degree for wrongfully taking, obtaining, or withholding money valued in excess of \$3,000.00 from the Division. Ms. Balakula pled guilty to one count of Petit Larceny for wrongfully taking, obtaining, or withholding money from the Division. On August 16, 2018, Mr. Pancharoen was sentenced to five years of probation and ordered to pay restitution of \$286,200.00, plus a surcharge fee of \$14,310.00 to Albany County, New York. Ms. Balakula was sentenced to three years of probation and restitution of the same amount.

9. In the transcript of the proceeding for Mr. Pancharoen's guilty plea from June 14, 2018, Judge Peter Lynch, Judge of the Supreme Court of Albany County, New York, asked Mr. Pancharoen the following:

"Directing your attention to the information. Sir, do you admit between December 1, 2009, and November 30, 2015, at the New York State Department of Taxation and Finance, in the City and County of Albany, State of New York, that you did wrongfully take, obtain or withhold property consisting of United States currency, valued in excess of \$3,000, from the New York State Department of Taxation and Finance, with the intent to deprive another of the property or to appropriate the property to yourself or to a third person, do you admit that?"

Petitioner responded: "Yes, sir."

10. In the transcript of the proceeding for Ms. Balakula's guilty plea from the same date, Judge Lynch asked her the following:

“Directing your attention to the information, do you admit between December 1, 2009 and November 30, 2014, at the New York State Department of Tax and Finance in the City and County of Albany, State of New York, that you did wrongfully take, obtain or withhold property consisting of United States currency from the New York State Department of Taxation and Finance with the intent to deprive another of the property or to appropriate the property to herself or to a third person, do you admit that?”

Petitioner responded: “Yes.”

11. As a result of the audit, penalties were imposed on Taste of Thai by notice of determination L-051098937, dated December 19, 2019 (notice 1). This notice is not part of the instant action. In the computation section of notice 1, it stated, in relevant part, as follows: “[w]e added fraud penalty of two times the amount of the tax you owe, plus statutory interest (NYS Tax Law section 1145). This notice is one of multiple Notices we either have issued, or will issue, concerning this audit case.” The total penalty asserted against Taste of Thai was \$1,201,199.93. This included the penalty for failure to pay tax due to fraud and a penalty for under-reporting tax due in excess of 25 percent.

12. Thereafter, on January 10, 2020, the Division issued to Mr. Pancharoen, in addition to two notices of determination not relevant here, notice of determination L-051141903 (notice 2), asserting interest of \$1,032,848.26 and penalty of \$1,201,199.93. Notice 2 was issued because Mr. Pancharoen was “an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1) and 1133 of the New York State Tax Law.”

13. On the same date, the Division issued to Ms. Balakula, in addition to two notices of determination not relevant here, notice of determination L-051141906 (notice 3), asserting interest of \$1,032,848.26 and penalties of \$1,201,199.93. Notice 3 was issued because Ms.

Balakula was “an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.”

14. Petitioners each requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) protesting notice 2 and notice 3, respectively. By BCMS conciliation order numbers 000318684 and 000318685, each dated November 12, 2021, BCMS sustained the notices.

15. On December 8, 2021, petitioners each timely filed a petition with the Division of Tax Appeals. In their nearly identical petitions, they asserted that “pre-assessment penalties and interest against responsible persons is not appropriate, as it violates the underlying statutes.” They claimed that the relevant statutes only impose personal liability for the tax imposed against a corporation, not penalties and interest.

16. The Division filed an answer to the petitions on February 9, 2022, and petitioners each filed a reply to the answer on February 25, 2022.

17. In support of its position, the Division submitted the affidavit of Gina Tagliavento, a Tax Auditor I for the Criminal Investigations Division of the Division, sworn to on November 7, 2022. Ms. Tagliavento has been a Tax Auditor I for the Division for approximately 16 years. Her duties include conducting audits of sales tax returns, withholding tax returns, personal income tax returns and cigarette tax returns.

18. Ms. Tagliavento averred that her office opened an investigation of Taste of Thai in November of 2013, after several indications that it was underreporting sales tax and it failed to file sales tax returns. Initially, the data analysis showed that Taste of Thai’s merchant card deposits and reported gross sales did not match. Additionally, Taste of Thai’s filed corporate tax returns reported substantially greater amounts than what was reported on its sales tax returns. As

a result of these discrepancies, a criminal investigation commenced, and the Division conducted a sales tax audit. Ms. Tagliavento performed the initial analysis, assisted the auditor during the audit, and finalized the audit when the auditor conducting the case left the Division.

19. Ms. Tagliavento averred that the notices at issue asserted fraud penalties pursuant to Tax Law § 1145 (a) (2). She stated that the basis for the fraud penalties was that petitioners “willfully and intentionally failed to file sales tax returns for the purpose of deliberately underreporting both sales and sales tax due and owing, and failed to remit sales tax monies collected and due to the State of New York.” Notices 2 and 3 also asserted penalties under Tax Law § 1145 (a) (1) (vi) because petitioners underreported an amount in excess of 25 percent of the amount of sales tax required to be shown on Taste of Thai’s sales tax returns.

20. A forensic audit report was included in the evidence submitted with Ms. Tagliavento’s affidavit. The report lists Lee E. Shepter, Forensic Auditor and Investigator Bobbi-Jean Bryden on its cover. It is not clear from the record which of the two people authored the report. The report provided that at the beginning of the investigation of Taste of Thai, bank records were subpoenaed and analyzed. Documents received from Bangkok Bank included Taste of Thai’s monthly sales summary reports. These were analyzed and compared to the corporate income tax returns that had been filed. The results were close between the sales figures from the monthly sales summaries and the sales figures as claimed on the corporation income tax returns. When compared to the revenues as reported on the sales tax returns, the sales figures from the monthly sales summaries exceeded the sales figures claimed on the sales tax returns.

Additionally, the report provided that on January 28, 2016, a search warrant was executed at the business address of Taste of Thai Express, Inc. and at the residence of Ms. Balakula. Daily

sales summaries, daily sales tax summaries and, where found, monthly sales summaries and monthly sales tax summaries were among the seized books and records. These summarized reports were analyzed and the auditors created schedules. The daily and monthly sales summary reports detailed the sales activity by payment type such as cash, gift card, or credit card, and on-line services such as Grub Hub. From a review of the reports, there were days during each monthly period where no sales tax data existed. Where days were missing and the audit information was incomplete or non-existent, no estimate or inference was made as to the sales or sales tax figures. The final sales tax liability was derived from summarizing the sales tax as specifically stated in the daily or monthly sales tax summary reports printed from the point-of-sale (POS) system and found stored within various notebooks seized while a search of the premises was conducted. Based on its analysis, the Division determined that Taste of Thai underreported their taxable sales by \$8,310,583.00 and collected, but failed to remit, at least \$597,407.00 in sales tax during the audit period.

21. The Division also submitted transcripts of informal interviews of petitioners into evidence. Ms. Balakula's interview was conducted by Mr. Shepter and Nicole Napoli, a Forensic Tax Auditor for the Division. The year of this interview is not given, but the month and day were January 28th.<sup>1</sup> During the interview, Ms. Balakula stated that she has a master's degree in journalism and communication from "Madison, Wisconsin." She also stated that she does not have an accounting or business background.

When discussing Taste of Thai, Ms. Balakula stated that the entity is organized as an S corporation that has been in business since 2003 and has been at the current location since 2010. She stated that she is the owner of Taste of Thai with her husband, Mr. Pancharoen. She also

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<sup>1</sup> It appears that these interviews took place on January 28, 2016, the same day the search warrant was executed.

stated that she and Mr. Pancharoen were the two people responsible for Taste of Thai. She confirmed that Taste of Thai was open 7 days a week from 11:00 a.m. to 10:00 p.m. She also stated that she had about 34 employees and that she uses Paychex to manage payroll.

When asked whether she collected sales tax, Ms. Balakula stated that she did and that she thought it was separately stated on each receipt. She explained that the sales tax was deposited into a bank account at Tompkins Trust bank, and that most of the payments they received were by credit card.

Ms. Balakula advised that she was in the process of hiring a new accountant because, as the business grew, it was confusing for them to keep track of things. Her previous accountant was Paul Stearns. He prepared the corporation franchise tax returns but she or her husband completed the sales tax returns themselves. Petitioners also hired a bookkeeper who was about to start. Ms. Balakula stated that more than 90 percent of customers paid with credit card. She also asserted that she made exempt sales to Cornell University and had exemption certificates from it.

Ms. Balakula also confirmed that all sales went through the POS machine. She believes they started using the POS system in 2010 and that Digital Dining was the manufacturer. She explained that the orders had to go through the POS machine because if they did not, the food would not be made in the kitchen because the POS machine sends the orders to the kitchen to be prepared. She also stated that she could print sales reports every day. She admitted she did not do it every day, but that sometimes she would try to go back and keep track daily. She also claimed that the POS system automatically closed out each night and switched to the next day.

Ms. Balakula stated that she used QuickBooks as an accounting program. She explained she started using QuickBooks in 2015 in order to keep better track of the records. Mr.

Pancharoen prepared the paper tax returns, except for one or two that she completed, before they were prepared online. She stated she prepared and filed the most recent returns online using Mr. Pancharoen's name and password. Mr. Pancharoen became ill in 2011 or 2012 and was less involved in Taste of Thai after that.

22. Mr. Pancharoen's interview was conducted by Bobbi-Jean Bryden, an investigator with the Division, and Janelle Sabins, an auditor with the Division. The date and time were not provided for this interview. When asked about his highest level of education, Mr. Pancharoen stated he went to college for business but that he did not take any accounting classes.

Mr. Pancharoen stated that Taste of Thai did collect sales tax, that it was separately stated on each receipt, and that after it was collected, it was deposited with Tompkins Trust. He also stated that every sale was entered into the POS system and that the manufacturer was Digital Dining. Mr. Pancharoen explained that each night a sales summary was printed from the POS system stating the sales and sales tax and how much money was collectively brought in that day. He stated that he did not prepare sales tax returns beginning around five or six years prior to the time of the interview.

Mr. Pancharoen also stated that Paul Stearns was his accountant until the year prior to the interview and that he had been his accountant since the beginning of 2003. Mr. Pancharoen did not know why Mr. Stearns prepared his corporate tax returns but not his sales tax returns. He stated that they switched accountants to Jim Streble because Mr. Stearns was slow in preparing their returns.

23. Petitioners were also subpoenaed by the Division and interviewed under oath on February 11, 2016. They were interviewed by Bobbi-Jean Bryden, Lee Shepter, and Melvin

Parker, an associate attorney with the Division. Petitioners were represented by Joe Callahan, Esq., during the interview.

Ms. Balakula testified that the building for the current location of Taste of Thai was built between 2008 and 2010. She testified that the construction was financed partially by her family and partially by Bangkok Bank through a branch in New York City. She also stated that the construction costs of Taste of Thai went over budget by approximately \$200,000.00. Petitioner confirmed that Bangkok Bank had commenced a foreclosure proceeding to foreclose on the property.

Ms. Balakula testified that Paul Stearns was her accountant until 2015, and that he prepared the corporate returns, but that she decided to switch because she needed more help with the business and when Mr. Stearns filed the corporate returns, they may not have been fully accurate because they were always completed at the last minute. She also stated that when she gave Mr. Stearns the sales information to report on the corporate returns, she calculated it for him using information from the daily sales from the POS system.

When asked about the sales tax returns and why some of the returns were not filed, she admitted she did not do a good job filing the returns and it was hard to keep track of things and remember to file them. She also stated that she never received a notice from New York State to file her returns. When asked if she knew when the quarterly sales tax returns were due, she stated that they were for every 3 months, and were due on the 20th of the month. She was then asked whether she paid the right amount of sales tax when she filed her returns. Her response was that they tried, but that there were some that they did not pay the entire amount because they did not have the funds to do so. The interviewers then asked Ms. Balakula whether the information reported on the sales tax returns that were filed was accurate. For each return, she

responded that she did not remember. She also responded that Mr. Pancharoen had prepared most of the returns.

24. During Mr. Pancharoen's interview, he testified that he got sick in 2006 and, thereafter, gradually became less active in the business. When asked about the sales tax returns that were filed during the audit period, Mr. Pancharoen stated he believed that he filed the documents, but that he did not know whether the numbers reported on the returns were accurate. He stated that his wife provided him with the figures that he reported on the return and that she obtained that information from the printout from the POS system. He also said that occasionally, he would get the printout with the numbers on it and use that to report the amount due. Mr. Pancharoen did not know who submitted the returns that were filed electronically.

25. Paul Stearns was also interviewed by Bobbi-Jean Bryden and Lee Shepter on February 25, 2016. Mr. Stearns is a CPA with more than 30 years of experience. He stated that he prepared the corporate tax returns for Taste of Thai from 2009 through 2014. Mr. Stearns only provided petitioners with services regarding their corporate and income tax returns. He explained that Ms. Balakula gave him bank statements and the breakdown of the sales information. He would take the raw data from Ms. Balakula and enter it into his QuickBooks program. He stated he could not get information from petitioners on a consistent monthly basis, and it often came in late and for a year at a time. He also stated that the information Ms. Balakula gave him for the corporate returns for the later part of the audit period appeared to come from a POS, but he never saw any POS reports. Mr. Stearns also stated that a review of the bank statements showed that petitioners regularly moved money from one bank account to another and that he thought it was to pay whatever creditor was collecting at that time. Mr. Stearns asserted that petitioners owe him roughly \$5,000.00 for his accounting services.

26. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioners each submitted 10 proposed findings of fact. Numbers with a “B” before them indicate proposed findings of fact submitted by Ms. Balakula. Numbers with a “P” before them indicate proposed findings of fact submitted by Mr. Pancharoen. In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact B1, and P1 through B3 and P3, P6, B6, P7, and B7 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein. Proposed findings of fact P4, B4, P5, B5, P8, B8, P9 and B9 have been modified to more accurately reflect the record and/or accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record; to the extent accepted, they have been consolidated, condensed, combined, renumbered, and substantially incorporated herein, as modified. Proposed findings of fact P10 and B10 are rejected as conclusory, irrelevant and/or not supported by the record.

#### ***SUMMARY OF THE PARTIES’ POSITIONS***

27. Petitioners argue that Tax Law § 1138 (a) does not operate to render petitioners, each a person responsible to collect tax under Tax Law § 1133 (a) (1), responsible for the penalties and interest assessed against Taste of Thai. They claim that Tax Law § 1138 (a) instead reinforces their position that the liability of a responsible person is limited to only the “tax” of the company. Petitioners contend that Tax Law § 1133 (a) (1) imposes personal liability on a person required to collect tax only for the tax itself, and that the definition of tax under Tax Law § 1131 (3) does not include penalties and interest. They also assert that *Lorenz v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.* (212 AD2d 992 [4th Dept 1995], *affd* 87 NY2d 1004 [1996]), holding that responsible persons were liable for penalty and interest

imposed on the relevant entity, was wrongly decided and wrongly affirmed by the Court of Appeals as contrary to the plain language of the applicable statutes.

28. The Division asserts that petitioners each signed a plea agreement in which they acknowledged that they utilized Taste of Thai to commit fraud. It contends that because of this, petitioners are estopped from claiming that they are not responsible for the penalties and interest owed by Taste of Thai.

The Division also asserts that penalty and interest are to be determined, assessed, collected, and enforced in the same manner as sales tax, and that petitioners are liable for the fraud penalties asserted. It claims that the substantial amount of sales tax that was collected but not remitted and petitioners' conduct, including their admission that they were persons required to collect and remit tax and that this audit was not the first time petitioners were found to be delinquent in the payment of sales tax, establishes willful intent to evade the payment of tax.

The Division also claims that if it has not met its burden of proving that the fraud penalty was properly imposed, negligence penalties pursuant to Tax Law § 1145 (a) (1) should be assessed in the alternative. It contends that the record lacks any credible evidence that petitioners' violation of the Tax Law was not intentional, designed, or voluntary, and, therefore, negligence penalties should be imposed if fraud penalties are not.

#### ***CONCLUSIONS OF LAW***

A. Tax Law former § 1133 (a) imposes upon any person required to collect the tax imposed by article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, every vendor of tangible personal property or services, and corporate officers, directors and employees who are under a duty to act for such corporation in complying with the requirements of article 28

(Tax Law former § 1131 [1]). Here, petitioners concede that they are each a person required to collect tax pursuant to Tax Law former §§ 1131 (1) and 1133 (a). However, they contest that these sections also subject them to liability for interest and penalty.

B. It is well settled that a person responsible to collect tax is also personally liable for penalties and interest (*see Matter of Lorenz*, citing *Matter of Hall v Tax Appeals Trib.*, 176 AD2d 1006, 1007 [3d Dept 1991]; *Matter of Dong Ming Li v Commissioner of Taxation and Fin.*, 65 AD3d 763, 764 [3d Dept 2009]). Tax Law § 1145, entitled “Penalties and interest,” provides that “[a]ny person failing to . . . pay or pay over any tax . . . within the time required . . . shall be subject to penalty” (Tax Law § 1145 [a] [1] [i]), and “[i]f any amount of tax is not paid on or before the last date prescribed in this article for payment . . . interest on such amount . . . shall be paid” (Tax Law § 1145 [a] [1] [ii]). Additionally, Tax Law § 1145 (a) (7) provides that penalties and interest are to be “determined, assessed, collected and enforced in the same manner as the tax.” As stated in *Lorenz*, “[Tax Law § 1145] as well as other pertinent provisions set forth in Tax Law § 1138 (a) (3) (B) and (a) (4) and § 1141 (a) and (b), makes clear that a person held liable for failure to pay over sales tax may also be held liable for penalties and interest” (212 AD2d at 993; *Abrams v Tax Appeals Trib.*, 216 AD2d 684, 685 [3d Dept 1995]). As there is no dispute that petitioners are liable for Taste of Thai’s collection and remittance of sales tax, they are likewise liable for penalties and interest.

Petitioners argue that *Lorenz* was wrongly decided and contrary to the plain language of the applicable statutes and that instead, the Appellate Division, Fourth Department’s prior decision in *Laks v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.* (183 AD2d 316 [4th Dept 1992]), which was abrogated by *Lorenz*, should control. In *Laks*, as relevant here, the Appellate Division, Fourth Department determined that the Division had no authority under

article 28 of the Tax Law to hold the petitioner liable for penalties and interest (183 AD2d at 320). It held that Tax Law § 1133 (a) did not extend personal liability beyond tax to payment of penalties and interest (*id.*). This argument is without merit and is rejected. The plain language of Tax Law § 1145 (a) (7) as well as the holding of the Appellate Division, Fourth Department in *Lorenz* are clear. In *Lorenz*, the Appellate Division, Fourth Department expressly stated, “to the extent that our decision in *Laks* can be read as holding that a corporate agent may not be held liable for penalties and interest, it is no longer to be followed” (212 AD2d at 993). Moreover, in accordance with the principle of stare decisis, it is concluded that *Lorenz* is dispositive in the instant matter. Accordingly, where petitioners are responsible persons required to collect tax, they are also liable for penalties and interest.

C. Tax Law § 1145 (a) (2) provides for the imposition of a civil fraud penalty if the failure to report or pay over tax to the Division within the time required is due to fraud. The Division seeks to impose a fraud penalty upon petitioners pursuant to Tax Law § 1145 (a) (2), or, in the alternative, impose a negligence penalty pursuant to Tax Law § 1145 (a) (1).

Fraud is not defined in the Tax Law. However, case law has held that a finding of fraud requires the Division to show “clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing” (*see Matter of Aqua-Mania, Inc.*, Tax Appeals Tribunal, March 6, 2008, quoting *Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000). In order to establish fraudulent intent, petitioners must have acted deliberately, knowingly, and with the specific intent to violate the Tax Law (*see Matter of Silverstein*, Tax Appeals Tribunal, December 7, 2017).

Fraud need not be established by direct evidence but can be shown by surveying the taxpayer's entire course of conduct and drawing reasonable inferences therefrom (*id.*). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence (*see Rodriguez v Tax Appeals Trib. of State of New York*, 82 AD3d 1302, 1304 [3d Dept 2011] *lv denied* 17 NY3d 702 [2011]). Relevant factors include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies, and the taxpayer's entire course of conduct (*see Matter of What a Difference Cleaning, Inc.*, Tax Appeals Tribunal, May 15, 2008, citing *Intersimone v Commissioner*, TC Memo 1987-290, 53 TCM 1073 [1987]). However, fraud must be established with affirmative evidence and may not be presumed (*id.*). Therefore, mere suspicion of fraud from the surrounding circumstances is not enough (*id.*).

In this case, the Division has failed to meet its burden of establishing the "clear, definite and unmistakable" evidentiary standard necessary to sustain a fraud penalty (*see Matter of Sona Appliances*). The record does not provide unmistakable evidence that petitioners deliberately falsified their sales tax returns to report and ultimately, remit less than what was owed, or that their failure to file returns was intentionally done to deceive the Division as to the sales tax that was due, in violation of the Tax Law (*see Matter of Aqua-Mania, Inc.*).

Petitioners did owe a substantial amount of sales tax for the audit period, most of which they failed to report. However, the mere understatement of income, standing alone, is not sufficient to establish fraud (*Matter of Waples*, Tax Appeals Tribunal, January 11, 1990). Consequently, in order to establish fraud, it is necessary that other indicia of the taxpayer's specific and willful intent to evade the tax must be present (*Matter of What a Difference Cleaning, Inc.*). Here, petitioners conceded they had a POS system that provided the sales

revenue and sales tax due each day. However, Ms. Balakula admitted she did not always print the daily reports. She explained that the business grew during the six-year audit period, and that at the same time, Mr. Pancharoen, the only other person responsible for the business, was ill and was less involved. Petitioners also admitted that they struggled to keep and maintain adequate records, as was evidenced by the audit findings from the first audit of Taste of Thai. However, they have made changes to improve their record keeping. They purchased QuickBooks, hired a bookkeeper and a new accounting firm whom they intended to use to help them prepare sales tax returns in addition to the income tax returns. Petitioners also willingly participated in interviews by the Division both before and after they were subpoenaed. Petitioners' course of conduct does not support a finding of fraud (*see Matter of Cousins Serv. Sta.*, Tax Appeals Tribunal, August 11, 1988). As such, the Division has not proven by clear and convincing evidence that petitioners acted with willful intent to fraudulently deprive the State of sales and use taxes owed. Accordingly, the fraud penalty is cancelled.

D. The Division argues that petitioners are estopped from claiming that they are not responsible for the penalties and interest owed by Taste of Thai because they signed plea agreements in which they acknowledged that they utilized Taste of Thai to commit fraud. This assertion, however, is not supported by the record. The legal doctrine of collateral estoppel precludes a party from relitigating an issue that was previously decided in a prior action or proceeding against the same party or those in privity (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The issue for which preclusion is sought must be identical to that decided in the prior proceeding (*Staatsburg Water Co. v Staatsburg Fire Dis.*, 72 NY2d 147, 153 [1988]). Here, the plea agreement itself was not provided in the record. Additionally, the transcripts of petitioners' guilty pleas were for larceny and petit theft for wrongfully taking, obtaining, or

withholding money from the Division, with the intent to deprive the Division of it. Fraud requires something more. In order to establish fraudulent intent, petitioners must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (*see Matter of Sona Appliances*). Here, petitioners pled guilty to withholding money with the intent to deprive the Division of it, not knowingly, with specific intent to violate the Tax Law. They did not plead guilty to a crime involving fraudulent intent. Accordingly, the Division's estoppel argument is rejected.

E. The Division asserted in its answer and in its brief, alternatively, assuming the fraud penalty was not sustained, that a penalty is appropriate pursuant to Tax Law § 1145 (a) (1) (*see Matter of Iiter Sener*, Tax Appeals Tribunal, May 5, 1988). "It was not the Legislature's intention to impose no penalties in those instances where a taxpayer's failure to pay falls just short of fraud, but where such failure was clearly due to willful neglect" (*id.*). The Division bears the burden of proving that petitioners' failure or delay was due to willful neglect and not due to reasonable cause (*id.*). Here, it has met its burden.

The Division's audit of the information that was obtained through a search warrant established an enormous level of underreporting of sales revenue and sales tax over a substantial and continuous period of time. This is particularly problematic here, where petitioners had the necessary records available on their POS system. Petitioners provided their accountant with the sales records necessary to prepare the corporation franchise tax returns, and these records, and ultimately, the corporation franchise tax returns filed using these records, revealed a much higher amount of sales tax due than petitioners reported on their sales tax returns. When asked how she determined the sales tax due for the three quarters where she filed returns during the audit period, Ms. Balakula's response was that she could not recall. Meanwhile, she had that necessary

information in the daily and monthly reports provided in her POS system that both she and her husband stated was used to process every sale. Petitioner did explain that the business grew during the audit period, and that it was hard for her to keep track of everything. It is understandable that it is hard to manage a growing business and also maintain books and records. Nonetheless, all of the information she needed was recorded on the POS system. She could print out reports at the end of each day showing how much was made in sales and what was collected in sales tax, as the auditors did after-the-fact.

Ms. Balakula also stated she did not receive anything from the Division instructing her to file her returns. However, this was not the first audit of petitioners, and not the first time they were found to have underreported the amount of sales tax due. Accordingly, she cannot deny she was aware of the responsibility to file the quarterly sales tax returns. Petitioners' failure to file returns for most of the audit period and remit most of the tax due when they had all of the necessary information tracked and available to them in the POS system, while short of fraudulent, was unquestionably due to willful neglect and not due to reasonable cause. The Division's imposition of a penalty pursuant to Tax Law § 1145 (a) (1) is proper.

F. With regard to the penalty imposed pursuant to Tax Law § 1145 (a) (1) (vi) for failure to report and pay sales tax in an amount in excess of 25 percent of the amount required to be shown on the return, such penalties are not based on fraud. As such, petitioners bear the burden of proving that penalties were improperly assessed (*see Matter of T.V. Data, Inc.*, Tax Appeals Tribunal, March 2, 1989). Penalties may be abated upon the showing of reasonable cause and a lack of willful neglect (Tax Law § 1145 [a] [1] [iii], [vi]; 20 NYCRR 2392.1). Petitioners did not address these penalties and as such, have failed to meet their burden of showing that the underpayment of tax was due to reasonable cause and not willful neglect.

G. The petitions of Sirathorn Balakula and Akhin Panchareon are granted to the extent indicated in conclusion of law C but are otherwise denied. The Division is directed to revise notices of determination L-051141903 and L-051141906 in accordance with conclusion of law C, and the notices of determination, as recalculated, are sustained.

DATED: Albany, New York  
March 23, 2023

/s/ Jessica DiFiore  
ADMINISTRATIVE LAW JUDGE